IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM W. CRAWFORD,
Appellant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a corporation, OREGON-WASHINGTON TIMBER COMPANY, a corporation; BLAZIER TIMBER COMPANY, a corporation; MISSISSIPPI VALLEY TRUST COMPANY, a corporation, Trustee; UNION Trustee; FRANK P. HAYS and WILLIAM C. LITTLE, co-partners doing business as LITTLE & HAYS; —— HAYS; BRECKENRIDGE JONES, ELI KLOTZ, JAMES GROVER, JAMES E. BROECK, J. E. BLAZIER, E. J. BLAZIER; and JOHN A. PRESCOTT and D. L. ROBINSON, co-partners doing business as JOHN A. PRESCOTT & COMPANY,
Appellees.

No. 2723.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

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STATEMENT.

This action was instituted by the Mississippi Valley Trust Company and the Union Trust Com-

pany to foreclose two mortgages executed on June 4th, 1910, upon real and personal property situated in the State of Washington.

One of said mortgages was executed in June, 1910, by the Washington Northern Railroad Company to the Mississippi Valley Trust Company to secure an issue of bonds in the aggregate amount of $1,000,000. The other mortgage was executed to the Mississippi Valley Trust Company and the Union Trust Company by the Oregon-Washington Timber Company to secure an issue of bonds in the aggregate amount of $600,000. (Complainants' Exhibits 8 and 9, Tr. p. 246).

On the 10th of June, 1910, the Oregon-Washington Timber Company executed to the Mississippi Valley Trust Company a second mortgage to secure an issue of bonds in the sum of $400,000. (Complainants' Exhibit 10, Tr. p. 247).

On the same date the Oregon-Washington Timber Company made a written proposition to the Washington Northern Railroad Company to purchase its $1,000,000 of first mortgage bonds and pay for the same by the transfer and delivery to the railroad company of $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company, secured by $400,000 of the first mortgage bonds of the railroad company, and by the further

payment of the sum of $540,000 in cash, to be used for certain specific purposes. (Complaints' Exhibit 13, Tr. 76, 247, 309).

The $600,000 of the first mortgage bonds of the railroad company were delivered to the Mississippi Valley Trust Company in trust as security for the $600,000 of the first mortgage bonds of the Oregon-Washington Timber Company and the remaining $400,000 first mortgage bonds of the railroad company were deposited with Mississippi Valley Trust Company as security for the $400,000 of second mortgage bonds issued by the Oregon-Washington Timber Company. (Tr. p. 79). The first mortgage bonds of the railroad company were numbered from 1 to 1000 inclusive, and each bond was for the amount of $1000. The first mortgage bonds of the Oregon-Washington Timber Company were numbered from 1 to 600 inclusive and were for $1000 each, and the second mortgage bonds of the timber company were numbered from 1 to 400 inclusive, each for the amount of $1000.

The foreclosure of the first mortgage of the Washington Northern Railroad Company, securing bonds in the sum of $1,000,000 and the foreclosure of the first mortgage of the Oregon-Washington Timber Company securing $600,000 of bonds were attempted in a single amended bill of complaint. (Tr. pp. 3-38).

On April 1st, 1912, the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company executed to William W. Crawford, trustee, a certain mortgage upon real and personal property in the State of Washington, to secure bonds in the aggregate sum of $425,000. (Complainants' Exhibit 11, Tr. p. 247).

William W. Crawford, trustee, answered the amended bill of complaint, making admissions and denials and interposed two affirmative defenses in his answer (Tr. pp. 64-91). To the affirmative defenses the complainants Mississippi Valley Trust Company and Union Trust Company interposed a motion to strike certain paragraphs therefrom. (Tr. pp. 163-166).

This motion was sustained by the Court (Tr. p. 167). Thereafter the appellant, William W. Crawford, filed his cross-complaint to foreclose his said mortgage of April 1st, 1912. The opinion of the Court sustaining the motion was in writing (Tr. pp. 305-320). To the cross-complaint the complainants answered (Tr. pp. 146-159). The appellant Crawford also moved to dismiss the bill of complaint (Tr. p. 159) and the same was denied by the Court (Tr. p. 162).

Upon the issues made up by the pleadings the

case proceeded to trial and on the 4th of March, 1915, the final decree was entered, foreclosing the first mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and the first mortgage executed by the Oregon-Washington Timber Company to the Missippi Valley Trust Company and the Union Trust Company; also the mortgage executed by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company to William W. Crawford, trustee (Tr. pp. 178-227). From this decree William W. Crawford has prosecuted this appeal.

The specifications of the errors of the Court in the trial of said cause and in the entering of the decree are embraced in the assignments of error (Tr. pp. 231-246) and are as follows:

I.

That the United States District Court for the Western District of Washington, Southern Division, erred in denying the motion interposed by the defendant and appellant, William W. Crawford, trustee, to strike certain paragraphs and allegations contained in the original complaint filed in the case.

II.

That the said Court erred in denying the motion interposed by the defendant and appellant, William

W. Crawford, trustee, to strike certain paragraphs and allegations contained in the amended complaint filed in said case.

III.

That said Court erred in granting the motion of the complainants to strike certain paragraphs and allegations from the answer of the defendant, William W. Crawford, trustee, and to strike certain paragraphs and allegations from the cross-complaint of the cross-complainant, William W. Crawford, trustee.

IV.

That said Court erred in making and entering the following finding and holding contained in the decree:

"Heretofore, and on June 4th, 1910, the defendant railroad company executed and delivered to camplainant Mississippi Valley Trust Company, as trustee, its certain deed of mortgage conveying and transferring to the trustee thereunder certain properties hereinafter described, and the same having been so executed as to entitled it to record the same was on June 10, 1910, duly recorded in the office of the Auditor of Skamania County, Washington, wherein the properties therein described were situated, in Book 'I' of Mortgages, pages 339 to 356, both inclusive; said mortgage was executed to secure 1000 bonds, numbered from 1 to 1000, both inclusive and of the denomination of $1000 each, dated as of June 4th, 1910, and maturing on May 1st, 1928, 600 of the bonds, numbered from 1 to 600, both inclusive, being by the railroad company duly negotiat-

ed and deposited with the Mississippi Valley Trust Company, as trustee, by way of collateral to a mortgage bond issue of the Oregon-Washington Timber Company of June 4th, 1910, hereinafter found and determined, and 400 of the said bonds, numbered 601 to 1000 inclusive were duly negotiated to the Oregon-Washington Timber Company and by it duly assigned to the railroad company as collateral under a second mortgage bond issued by the timber company as hereinafter found and determined. That the debt evidenced by the second mortgage bonds of the timber company has not been paid. That the interest of the railroad company in the said 400 railroad bonds immediately on its acquiring of the same because subject to the lien of the 600 railroad bonds then outstanding, and the said 400 railroad bonds could be, and were in fact, reissued by the railroad company only as inferior in dignity and subsequent in time of payment to the 600 bonds first negotiated and then outstanding."

V.

The said Court erred in making and entering the following finding and holding contained in said decree:

"Thereafter and on June 4th, 1910, likewise said the Oregon-Washington Timber Company executed a second mortgage to the Mississippi Valley Trust Company, as trustee, of all and singular the property described in its first mortgage of June 4th, 1910, and of all and singular its ownership, right and title to $400,000 par value of the 6% first mortgage gold bonds of the Washington Northern Railroad Company, dated June 4th, 1910, and which by the terms of said mortgage matured May 1st, 1928. Said second mortgage likewise provided, and the second mortgage bonds issued thereunder so provided, that the mortgage debt should draw interest at

6% per annum, payable semi-annually, and by the terms of the mortgage security and of the bonds issued thereunder the bonds so issued were numbered from 1 to 400, both inclusive and matured serially, first maturity thereof beginning on May 1st, 1922, and terminating May 1st, 1928, and second mortgage bonds secured by said mortgage were negotiated by the timber company and delivered to the Washington Northern Railroad Company, and for the said second mortgage bonds of the timber company, aggregating $400,000 and for considerations running from the said timber company to the railroad company said first mortgage bonds of the railroad company of June 4th, 1910, were issued, negotiated and delivered to the said timber company."

VI.

The said Court erred in making and entering the following finding and holding contained in the decree:

"In the contract for the purchase and sale of said second mortgage bonds it was provided:

"As a further consideration for the sale to us of said $1,000,000 par value of your bonds and without any new or further consideration, we agree to sell and deliver to you $400,000 per value 6% gold bonds issued by us, dated the 1st day of May, 1910, due serially $30,000 par value every six months, beginning May 1st, 1922, and ending May 1st, 1928, secured by a second mortgage on our lands and timber in Skamania County, Washington, and secured also by $400,000 par value of the $1,000,000 par value of bonds now proposed to be purchased by us from you; said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad after the expenditure of the said sum of $450,000 above mentioned."

VII.

The said Court erred in making and entering the following finding and holding contained in the decree:

"That the second mortgage bonds of the Oregon-Washington Timber Company and the 400 railroad bonds collateral thereto were not used for future extensions, betterments or equipment for the railroad, but the interests of the Washington Northern Railroad Company therein was assigned and transferred, as hereinafter set forth, to the defendant William W. Crawford, trustee, subject, however, to the paramount lien and interest of the holders of the 600 railroad bonds aforesaid."

VIII.

The said Court erred in finding and decreeing that the true intent and agreement between the complainants and the mortgagors in the mortgages executed severally by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company "was to and did convey all of the property, real, personal and mixed, of every kind and wheresoever situate, and all appendages and appurtenances thereto, and all of the equities of redemption, reversions, interests, liens, franchises, rights, privileges, immunities, claims and demands, as well in equity as in law, then owned, possessed or enjoyed, and which might hereafter be in any wise acquired, owned, possessed or

enjoyed by the Washington Northern Railroad Company or the Oregon-Washington Timber Company, notwithstanding that the same was not particularly set forth in said indentures and not particularly described therein."

IX.

The said Court erred in finding and decreeing that the so-called "after acquired property clause" contained in the mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company covered and included the 400 railroad bonds numbered from 601 to 1000 inclusive issued by the Washington Northern Railroad Company.

X.

The said Court erred in making and entering the following finding and holding contained in the decree:

"On March 1, 1912, the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company, all of which said companies being then owned, dominated and controlled by the same set of people, and practically and in effect one company, pursuant to the unanimous resolution of the stockholders and Board of Directors of the said companies, executed and delivered to the defendant William W. Crawford, trustee, their mortgage deed of trust, whereby they transferred and conveyed to the said trustee the property of the railroad hereinbefore described and which prior thereto had been mortgaged to the Mis-

sissippi Valley Trust Company as trustee, as hereinbefore found, under the mortgage of date June 4th, 1910, and the property of the timber company which had theretofore been mortgaged under its first mortgage of June 4, 1910, to the Mississippi Valley Trust Company as trustee, and which is hereinbefore described and which has been mortgaged likewise by said timber company by its second mortgage of June 4, 1910, hereinbefore found, and the said railroad company, one of the mortgagors to said mortgage, undertook to and did assign to said Crawford, trustee, as part security under said mortgage, $400,000 of the second mortgage bonds of the timber company, issued under its said second mortgage, and $1,000,000 first mortgage bonds of the railroad company *as they should thereafter from time to time be released and delivered, or releasable and deliverable, by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the timber company to said Mississippi Valley Trust Company.*"

XI.

The said Court erred in making and entering the following finding and holding contained in the decree:

"That the effect of the assignment of the railroad bonds so made" (to William W. Crawford) "was to assign the same subject to the prior lien and claim of the holders of the 600 railroad bonds first issued, and to postpone the rights of William W. Crawford, trustee, in the railroad security until after the said 600 railroad bonds had been fully paid and discharged."

XII.

The said Court erred in finding and decreeing

that the mortgage executed by the Oregon-Washington Timber Company, the Washington Northern Railroad Company and the Blazier Timber Company to William W. Crawford, trustee, was subordinate and inferior to the mortgages of June 4th, 1910, executed by the Washington Northern Railroad Company and by the Oregon-Washington Timber Company.

XIII.

The said Court erred in finding and decreeing that the assignment by the Washington Northern Railroad Company to William W. Crawford, trustee, of the $400,000 of first mortgage bonds of the Washington Northern Railroad Company, numbered from 601 to 1000 inclusive, was received and accepted by the said William W. Crawford, trustee, subject and inferior to the lien of the $600,000 of first mortgage bonds of the Washington Northern Railroad Company numbered from 1 to 600, both inclusive.

XIV.

The said Court erred in refusing to hold that the $400,000 of first mortgage bonds of the railroad company so assigned to the said William W. Crawford, trustee, under his mortgage of March 1st, 1912, were of equal standing and rank with the $600,000 of first mortgage bonds of said railroad company numbered from 1 to 600, both inclusive.

XV.

The said Court erred in finding and decreeing that the first mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company of June 4th, 1910, and the first mortgage of the Oregon-Washington Timber Company to the Mississippi Valley Trust Company of June 4th, 1910, were all executed and designed as security for one debt, to-wit, the indebtedness of the Oregon-Washington Timber Company under its first mortgage of June 4th, 1910, in the sum of $600,000 represented by the 600 first mortgage bonds of the Oregon-Washington Timber Company and in holding that the bonds secured by the mortgage of March 1st, 1912, executed to William W. Crawford, trustee, by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company, were and are junior and inferior to the $600,000 of first mortgage bonds of the Oregon-Washington Timber Company and the $600,000 first mortgage bonds of the Washington Northern Railroad Company numbered from 1 to 600, both inclusive.

XVI.

The said Court erred in decreeing that the sum of $33,250 was a reasonable sum to be allowed complainants for the services of their attorneys in this action.

XVII.

The said Court erred in decreeing that $1500 was a reasonable sum to be allowed to the complainants for their services as trustees.

XVIII.

The said Court erred in holding and decreeing that the mortgage of June 4, 1910, executed to the Mississippi Valley Trust Company by the Washington Northern Railroad Company and the mortgage executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company of June 4, 1910, should be foreclosed in the same action and cause.

XIX.

The Court erred in adjudging and decreeing that the proceeds of the sale of the property of the Oregon-Washington Timber Company should be applied to the following order:

1. To the payment of the costs of the said sale.
2. To the payment of the certificates of the Receiver of the Oregon-Washington Timber Company.
3. To the payment to Wallace McCamant, solicitor for complainants of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.
4. To the payment of the interest coupons maturing November 1, 1912, on the bonds of the Oregon-Washington Timber Company, of date June 4, 1910.
5. To the payment of the mortgage debt afore-

said, to-wit, the sum of $570,000 with interest thereon at the rate of 6% per annum from May 1, 1912, less the face of the coupons maturing November 1, 1912.

6. To the payment to E. S. McCord, solicitor for the defendant, William W. Crawford, trustee, of the sum of $2500, the attorney's fee allowed him for the foreclosure of the Crawford mortgage.

7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.

8. The overplus, if any, to be paid into Court to be distributed in such manner as the Court may direct.

XX.

The Court erred in adjudging and decreeing that the proceeds of the sale of the properties of the Washington Northern Railroad Company should be applied as follows:

1. To the payment of the costs of said sale.

2. To the payment of the certificates of the Receiver of the Washington Northern Railroad Company.

3. To the payment to Wallace McCamant, solicitor for complainants, of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.

4. To the payment of the coupons maturing November 1, 1912, on the bonds of the Washington Northern Railroad Company, of date June 4, 1910, numbered 1 to 600, less the 30 bonds which have been paid up and surrendered to said railroad company.

5. To the payment of the mortgage debt aforesaid, to-wit, the sum of $570,000 with interest thereon at the rate of 6% per annum from May 1, 1912, less the face of the coupons maturing November 1,

1912, on bonds 1 to 600, less the 30 bonds which have been paid and retired.

6. To the payment to E. S. McCord, solicitor for the defendant, William W. Crawford, trustee, of the sum of $2500, the attorney's fee allowed him for the foreclosure of the Crawford mortgage.

7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.

8. The overplus, if any, to be paid into Court, to be distributed in such manner as the Court may direct.

XXI.

The Court erred in refusing to hold that the proceeds of the sale of the properties of the Oregon-Washington Timber Company should be applied pro rata to the payment of the first mortgage bonds of the Oregon-Washington Timber Company numbered from 1 to 570, both inclusive, and that the equivalent of said sum be applied pro rata to the payment of the first mortgage bonds of the Washington Northern Railroad Company, numbered from 1 to 570, both inclusive, and in refusing to hold that the proceeds of the sale of the properties of the Washington Northern Railroad Company, after the payment of the costs and Receiver's expenses, should be applied upon the $400,000 of first mortgage bonds of the Washington Northern Railroad Company, represented by the said William W. Crawford, trustee, to the extent and in an amount so that each of the bonds numbered from 601 to 1000, both inclu-

sive, should receive a payment thereon equal to the payment on each of the bonds numbered from 1 to 570, both inclusive, and in refusing to hold that the first mortgage bonds of the Washington Northern Railroad Company, numbered from 601 to 1000, both inclusive, are of equal rank with the bonds numbered from 1 to 570, both inclusive of said Washington Northern Railroad Company; and in refusing to direct the application of the remaining proceeds of the sale of the properties of the Washington Northern Railroad Company pro rata upon all of the outstanding first mortgage bonds of the Washington Northern Railroad Company, numbered from 1 to 570, both inclusive and from 601 to 1000, both inclusive; and in holding that the attorney's fee of $33,250 should be paid from the proceeds of the sale of the properties of the Washington Northern Railroad Company prior to the application of the proceeds of the sale of the properties of the Washington Northern Railroad Company upon the indebtedness, principal and interest, represented by said first mortgage bonds of the railroad company.

XXII.

The said Court erred in holding and decreeing that the complainants were entitled to an attorney's fee of $33,250 payable twice, once out of the proceeds of the sale of the properties of the Oregon-

Washington Timber Company and second payable out of the proceeds of the sale of the Washington Northern Railroad Company.

XXIII.

The Court erred in holding and decreeing that $33,250 was a reasonable attorney's fee to be allowed to the complainants for the foreclosure of the mortgage of the Oregon-Washington Timber Company, and in holding that the same sum was a reasonable sum for the foreclosure of the mortgage of the Washington Northern Railroad Company.

XXIV.

The Court erred in refusing to hold and decree that William W. Crawford, trustee, held a first and paramount lien upon the $400,000 of first mortgage bonds of the railroad company numbered from 601 to 1000, both inclusive, and in refusing to hold and decree that the said William W. Crawford held a first and paramount lien upon the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, numbered from 1 to 400, both inclusive, and in refusing to direct and decree a sale of said last mentioned bonds.

XXV.

The said Court erred in holding that the property acquired by H. E. Collins, as Receiver of the Washington Northern Railroad Company and des-

cribed in the decree should be first sold and that the proceeds of the sale of said property should be applied to the payment of the Receiver's certificates.

XXVI.

The Court erred in adjudicating by its decree that the first mortgage given by the Oregon-Washington Timber Company under date of June 4, 1910, to the Mississippi Valley Trust Company secured the same debt as that evidenced by the mortgage and bonds of the Washington Northern Raliroad Company of date June 4, 1910.

XXVII.

The said Court erred in holding that the complainants were entitled to recover their costs and disbursements of the defendant William W. Crawford, trustee.

XXVIII.

The said Court erred in decreeing that $1500 of the $4500 paid to the Mississippi Valley Trust Company by the Oregon-Washington Timber Company, under the sinking fund provisions of the mortgage should be retained by the complainants for their use, and in holding that the remainder of said money be paid by the Mississippi Valley Trust Company to H. E. Collins to be applied by him pro rata on the indebtedness of the receivership.

XXIX.

The said Court erred in holding that under the provisions relating to after acquired property contained in the mortgage executed under date of June 4, 1910, by the Washington Northern Railroad Company to the Mississippi Valley Trust Company the Washington Northern Railroad Company acquired the $400,000 of first mortgage bonds of the railroad company numbered from 601 to 1000, both inclusive, and that such bonds became subject and subordinate to the lien of the first mortgage bonds numbered from 1 to 600, both inclusive, described in said mortgage dated June 4, 1910.

XXX.

The said Court erred in holding that it was the intention of all of the parties at the time of the execution of the Crawford mortgage to make the security given for said mortgage subject to the $600,000 mortgage bonds sold and delivered by the Mississippi Valley Trust Company.

XXXI.

The said Court erred in holding and decreeing that certain timber lands acquired after the execution of the mortgage of June 4th, 1910, by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company became subject to the lien of said mortgage.

ARGUMENT.

Motion of Complainant to Strike from Answer and Cross-Complaint of Appellant:

The third assignment of error embraced the motion to strike from the answer and cross-complaint of the appellant. We shall first direct the attention of the Court to the motion to strike from the answer (Tr. pp. 163-166). This motion is directed against two contentions set forth in the answer: a.—the allegations to the diversion from the amount to be realized from the sale of the first mortgage bonds of the Oregon-Washington Timber Company of the sum of $170,000, invested in timber lands of the timber company and of the sum of $100,000 invested in camp and logging equipment of the Oregon-Washington Timber Company instead of the application of these funds to the purposes agreed upon at the time all of the bonds of the railroad company and the timber company were issued under the mortgages of June 4th, 1910, which purposes are set forth in the contract of June 4th, 1910, found on pages 76 to 80 of the Transcript; and b.—the allegations of the answer relating to the diversion of the sum of $150,000 represented by bonds Series "B", secured by a deed of trust dated January 30th, 1911, executed by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and

the Blazier Timber Company to the Mississippi Valley Trust Company. (Defendant's Exhibit D-1, Tr. p. 249).

The Washington Northern Railroad Company issued $1,000,000 of bonds secured by a deed of trust to the Mississippi Valley Trust Company. The Oregon-Washington Timber Company issued $600,000 of first mortgage bonds secured by a deed of trust to the Mississippi Valley Trust Company, and $400,000 second mortgage bonds secured by a deed of trust to the same company. The railroad company sold its entire issue of bonds to the timber company and was to receive in payment therefor $540,000 in cash and $400,000 of second mortgage bonds of the timber company secured by $400,000 of the first mortgage bonds of the railroad company. The resolutions of both the railroad company and the timber company, set forth in the answer, and the agreement of June 4th, 1910, provided that the $540,000 should be deposited with the Mississippi Valley Trust Company for the purposes specified in said agreement. $250,000 was to be used for extensions, betterments and equipment of the railroad company's property; $150,000 to take up the first mortgage of the Cape Horn Railway Company; $125,000 for the payment of a floating indebtedness of the Cape Horn Railway Company

(which was the same company as the Washington Northern Railroad Company) and for the other purposes specified in said agreement.

As alleged in the answer, $175,000 of this money was not devoted to the purposes specified in the agreement, but was used to acquire additional timber lands for the Oregon-Washington Timber Company, and $100,000 was paid out for logging equipment and camps of the timber company.

It is alleged in the answer that this diversion of the funds was made under the direction of the syndicate which acquired the $600,000 of first mortgage bonds and which now owns and holds $300,000 of the $570,000 of bonds represented by the complainants in this action (Tr. pp. 81-84).

This diversion could not have been accomplished except through the active assistance of the Mississippi Valley Trust Company, one of the complainants in this action. The $300,000 of bonds now held by the same parties who brought about this diversion of funds are not held by innocent purchasers and acquired in the ordinary course of business. The complainants are merely the representatives of these bondholders. By the deposit with the Mississippi Valley Trust Company of the $540,000 realized from the sale of the bonds a trust was created, of which the Mississippi Valley Trust Company

was the trustee, and the actions of the Mississippi Valley Trust Company were dominated and controlled by the syndicate above referred to, and this money was diverted from its proper use by the collusion, connivance and fraudulent acts of the complainant Mississippi Valley Trust Company and the holders of $300,000 of the bonds now represented by the complainants and in violation of the fiduciary relation which the trust company and the syndicate owed to them and the future holders of the $400,000 of the first mortgage bonds of the railroad company which were claimed by the appellant to be of equal rank with the $600,000 of bonds of the railroad company.

The timber company and the syndicate had assumed by virtue of their action to apply the $540,000 in a manner that would innure to the benefit and enhance the security of the bonds of the railroad company. Instead of doing this they gave the money to the timber company an entirely different and distinct corporation from the railroad company.

It is true that the $540,000 was deposited with the trust company to the credit of the railroad company, but all of the stock of the railroad company, as alleged in the answer was owned by the syndicate, and a majority of the officers and directors of the railroad company were members of the syndicate,

some of whom were officers of the trust company (Tr. pp. 81-86). The railroad company is in the same position as though it had never received the $175,000 and the $100,000 so diverted, as stated in the answer. The railroad company, in legal effect, never received from the sale of the bonds that portion of the $540,000 that was diverted to the purposes of the timber company. The purchasers of the bonds have never paid the amount they agreed to pay for the bonds and there has been a partial failure of consideration to the extent of at least $275,000. The situation of the bondholders represented by the complainants is the same as though the $275,000 agreed to be paid for the bonds had never been paid.

Assume that the complainants admitted that the purchasers of the bonds had agreed to pay $540,000 for the bonds and they had not paid that sum by the sum of $275,000. Then there could be no doubt in the mind of the Court that, not having paid for the bonds, the trustees, as their representatives, would not be entitled to foreclose the mortgage for the $275,000 of bonds not paid for, and yet that is substantially the position of the holders of the $570,000 of bonds now represented by the complainants. They may have gone through the formality of depositing the money with the Mississippi Val-

ley Trust Company, but they immediately took the money away from the trust company and actively diverted it to other purposes. There has been a failure of consideration in any event, which can always be set up as a defense to the bonds.

We do not contend that that portion of the $570,000 bonds held by innocent purchasers could be precluded from having the mortgage foreclosed as to the bonds held by them. But whether the matter be viewed as one of failure of consideration or one of fraud on the part of the trustee company and the present holders of $300,000 of bonds, or whether it be regarded as a breach of duty by the trustees to the holders of the bonds secured by the three mortgages, there can be no question but that the complainants ought not to be permitted to enforce a lien upon their bonds unless they first account and give credit for the $275,000 of funds diverted through their fraudulent, collusive and conniving acts, and such fraud and collusion is clearly set forth in the answer.

It is alleged in the answer that the appellant Crawford, at the time he acquired the $400,000 of first mortgage bonds of the Oregon-Washington Timber Company secured by the $400,000 of first mortgage bonds of the railroad company had no knowledge of the diversion of these funds. The $400,000

of bonds of the railroad company were negotiable instruments, acquired by Crawford in good faith for value in the ordinary course of business and he was an innocent purchaser of such bonds. The trust company and the members of the syndicate who controlled the trust company as well as the railroad company, agreed that the $540,000 of railroad bonds should be devoted to specific purposes. They owed a duty to Crawford, or to the holders of the $400,000 of railroad bonds and the $400,000 of the timber company second mortgage bonds to carry out this agreement and apply the money in accordance therewith. They occupied a fiduciary relationship to the holders of these bonds when negotiated, and it would be unconscionable and unjust to permit them to enforce against the security of the Washington Northern Railroad Company and the Oregon-Washington Timber Company the amount of the bonds held by them, when they never in fact paid over the money to the railroad company and paid it over to another party in disregard of the rights of the holders of the $400,000 of first mortgage bonds of the railroad company, represented by the appellant Crawford in this action.

It is a fundamental principle of law that a trustee is charged with the duty of disposing of property entrusted to him for a specific purpose ac-

cording to the terms of his trust, and that if he does not do so he becomes personally liable for any injury that may result.

Now the trustee, according to the allegations of the answer, was controlled and dominated by the members of the syndicate, and when they come into a court of equity and ask aid of that court they ought to be required to come in with clean hands, and at least ought to be required to show that they had paid the money to the railroad company in some way. According to the allegations of the answer it is manifest that the railroad company never received one dollar of the $275,000 so diverted, as stated in the answer (Tr. pp. 85-86).

The Court can readily see how vitally the failure to carry out the agreement to apply this money according to the contract affects the interests of the appellant Crawford. If the money had been invested in extensions and betterments of the railroad the assets of the railroad company would have been increased over and above what they are by the sum of $275,000. Crawford owns $400,000 of the first mortgage bonds of the railroad company,—bonds that were issued at the time the $600,000 of bonds were issued, and of the same rank, as we shall hereafter contend, and he would have been entitled to share in the assets of the railroad company in the

same proportion that his $400,000 of bonds bears to the amount of bonds included in the $600,000 amount. Moreover, the trustee had this $275,000 under its control. It has never paid it to the railroad company. In legal effect the trustee still has that money, and it should be required as trustee to account for it and the money treated and considered as an asset of the corporation, and should be considered and treated as a fund to be applied, with the interest thereon, toward the liquidation of all of the bonds.

But it will be contended that the effect of the transactions alleged is not to create a defense to the foreclosure suit but to create a debt owing by the timber company to the railroad company, coupled with a right on the part of the railroad company to assert an equitable charge or lien for this debt on the property purchased for the timber company.

We cannot agree with counsel that the effect of the transaction is to create a debt owing by the timber company. The trustee and the bondholders, instead of paying the $275,000 to the railroad company, which they had agreed to do, paid it over to the timber company, and the security under the $400,000 of first mortgage bonds of the railroad company, held by Crawford, is reduced by that amount and it is proper for a court of equity to

determine the respective priorities of lien, and it seems to us it does create a defense to the extent of the diminution of the security, to the foreclosure suit.

It may be contended that the defense is essentially an allegation of *ultra vires* and that this contention is not available to a creditor, and especially not available to a creditor whose debt was not in existence at the time of the facts complained of.

It was not the act of the railroad company that deprived Crawford of the $275,000 of assets applicable towards the payment of the $1,000,000 of bonds of which he acquired $400,000, but it was the wrongful act of the trustee and the present bondholders, who diverted the security which they held for the security of Crawford's $400,000 of railroad bonds from the railroad company to the timber company. It is true that a general creditor has no right to plead the *ultra vires* acts of a corporation, but this does not apply to judgment creditors or to lien creditors, and in this case it seems to us that Crawford occupies the position of the holder of the $400,000 first mortgage bonds of the railroad company and is complaining that the other bondholders did not pay over to the railroad company the amount of the purchase price of the bonds, but gave it to another party, and it cannot be said that one bond-

holder cannot raise a question as to the relative rank and priority of liens. Crawford claims under the first mortgage of the railroad company, and it is one of the usual functions of a court of equity, when it has the custody and control of property subject to liens, to settle and determine the relative rank and priority of these liens; and while Crawford was not a creditor of the company on the 4th of June, 1910, when the bonds were issued by the railroad company, or when the money was diverted, still the bonds are of a negotiable character and he acquired them for value and is an innocent purchaser and holder of these bonds, and he contends in his answer that it would be inequitable and unjust to adjudicate his lien under his $400,000 of bonds to be of equal rank with that of the bondholders represented by the complainants, who have never paid the purchase price of their bonds to the extent of $275,000, and that there is a failure of consideration to that extent.

Crawford was not a creditor on June 4th, 1910, but when he purchased a negotiable instrument issued on that date his rights related back to the time of the issuance of the $400,000 of bonds, and he was entitled to be treated in the same way as though he had acquired the $400,000 for value, as an innocent purchaser, on June 4th, 1910.

It will also be contended that the defense is one of set-off or counterclaim, and that the Washington Northern Railroad Company had an election whether to assert this set-off or counterclaim in the case at bar, and that a subsequent mortgagee has no right to assert this election for it.

The rights of Crawford relate back and take effect from the date of the issuance of the $400,000 first mortgage bonds by the railroad company. His lien arose at that time, and the answer pleads that the bondholders represented by the complainants are estopped from asserting their claim for the full amount of their bonds for the reason that there has been a partial failure of consideration to the extent of $275,000. It is true Crawford has a second mortgage upon the assets of the Washington Northern Railroad Company and the Oregon-Washington Timber Company; but in addition to the second mortgage upon the tangible property, he also, by virtue of that instrument, took an assignment of the $400,000 first mortgage bonds of the railroad company and took these bonds as negotiable instruments and as an innocent purchaser, and took them as they were at the date of their issue, and he holds his lien, about which he is complaining, not on the strength of his second mortgage but upon the strength of the lien created in his favor by the instrument of June 4th,

1910; and the $400,000 mortgage bonds of the railroad company constitute a first lien upon the property of the railroad company; and we contend that it is inequitable and unjust, and that the bondholders who failed to pay the purchase price of the bonds to the railroad company are estopped to share and participate in the security left until they pay the purchase price of the bonds according to their agreement, or until they account for the same.

Crawford's security for the $400,000 of railroad first mortgage bonds constitutes a lien which he is seeking in a court of equity to protect. His right as a lienor under said bonds is being infringed and he is asking the aid of a court of equity to adjudicate and determine the relative priority of the bonds issued under that instrument, and it is a right that belongs to him as a lienor, and the power to exercise that right cannot be taken away from him by any action on the part of the railroad company.

The real gist of the defense is that the securities pledged have been diverted by the trustee and the bondholders it represents; that they never paid the purchase price of the bonds to the railroad company; that they are not holders for value, and ought not to be permitted to enforce in equity a claim upon the bonds for which they have never paid. Even if it be treated as a set-off or counterclaim, then under

the 30th Equity Rule it is a defense that arose out of the transaction which is the subject matter of the suit.

The subject matter of the suit is the foreclosure of a deed of trust securing bonds, and the $400,000 of railroad bonds are of equal rank, according to the trust deed, with the $600,000 in part represented by the complainants, or the persons whom the complainants represent, according to the answer. The relative rights of the holders of the security is the question involved and the claim that we assert as a defense is one growing out of the transaction of issuing and negotiating the bonds in question. It is not a claim at law but a claim cognizable in a court of equity, which always has the power to determine the method in which securities shall be adjudicated with reference to priority.

It will be contended that the claim admittedly affects only a portion of the bondholders. Assuming that this is true, it is not inequitable to have the question of the relative rank of the bonds secured by the instrument sought to be foreclosed determined in this action. The effect of this contention on the part of counsel is this: That the rights of the holders of valid bonds will be injured by the court adjudicating that other bonds of supposedly equal rank are invalid. Suppose one-half of the bonds

represented by the complainants are held by this Court to be unenforceable. Can it be said that the rights of the remaining bondholders represented by the complainants would not be benefitted by an adjudication that one-half of the bonds not held by them are invalid? The delay caused by the litigation, if successful, would be more than compensated for by the amount they would ultimately receive from the securities which are admitted by all parties to be wholly insufficient to pay all the bondholders in full.

It will also be contended that Crawford took his mortgage expressly subject to the mortgage of June 4th, 1910, executed by the railroad company to the Mississippi Valley Trust Company, and also subject to the mortgage of the Oregon-Washington Timber Company to the same trust company. It is true the mortgage states that it is subject, so far as the property described is concerned, to the lien of the two mortgages; but, as we shall attempt to show, Crawford acquired title as an innocent purchaser of $400,000 of these first mortgage bonds of the railroad company, and as the holder for value, without notice, of these $400,000 of first mortgage bonds, he is attempting to protect his rights as a lien holder under such bonds, and the doctrine of the cases which will be cited by counsel to the effect

that a second mortgagee, who takes his mortgage subject to a prior mortgage, cannot question the validity of the bonds secured by the first mortgage, has no application.

The mortgage taken by Crawford in 1912 recognized that it was a second mortgage insofar as the property described therein is concerned; but the mortgage operated as an assignment to Crawford of the $400,000 of first mortgage bonds of the railroad company, and as the holder of such bonds he did not waive his right to be treated as any other innocent holder of the same bonds for value.

This matter is discussed in Section 848 of Volume 3 of Cook on Corporations, and under the authorities there cited the doctrine that will be contended for by counsel for complainants has no application.

A general creditor will not be permitted to raise the defense we are asserting here; but Crawford is not a general creditor; he is the holder of a valid lien, of the same rank with the valid bonds represented by complainants. But under the authorities even a general creditor can raise an objection such as we are raising, if he first reduces his claim to judgment, even after the foreclosure has been completed.

In *Drury vs. Cross*, 7 Wallace, 299, a

general creditor at the time of the foreclosure sale, but who became a judgment creditor after the sale, caused the sale to be set aside as fraudulent, on the ground that most of the bonds were issued without consideration and for the purpose of wrecking the company for the benefit of the directors. The case of *James vs. Railroad Company*, 6 Wallace, 885, is to the same effect. In that case the court, at the instance of the judgment creditors, set aside the sale because of the $2,000,000 of bonds on which the foreclosure was obtained less than $200,000 were *bona fide* and enforceable.

And in this case we contend that by the fraudulent acts and connivance of the holders of $300,000 and the trustee, the complainant is attempting to establish a lien for bonds claimed to have been sold for $275,000, the proceeds of which were not paid over to the railroad company in accordance with the agreement. It never could have been intended that the recognition by Crawford of the existence of prior mortgages would operate as a waiver upon his part of his rights as the purchaser of the $400,000 first mortgage bonds of the railroad company, which inured to him by virtue of the provisions of the deed of trust securing such bonds.

We shall now consider that portion of complainants' motion to strike the defense pleaded concerning

the $150,000 Series "B" bonds, issued on the 30th of June, 1911.

The Court will observe that on the 30th of January, 1911, the railroad company joined in a mortgage to secure the bonds known as Series "B" in the sum of $150,000 (Tr. p. 87), and at that time the stockholders and officers of the railroad company were the present and then holders of $300,000 of bonds represented by complainants, and which we are now contesting. There was absolutely no consideration for the issuance of these bonds. It is alleged in the answer that Series "B" bonds in the sum of $150,000 represented the purchase price of the stock of the railroad company sold by the syndicate and the present bondholders to one Blazier, an individual, and that the bonds were issued to cover the purchase price and executed by the railroad company, the timber company and the Blazier company.

It ought to be apparent to this Court that the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company had no power to issue bonds to pay the purchase price of the stock of the railroad company sold by the syndicate to an individual; yet that is the exact situation here, according to the allegations of the answer. After Series "B" bonds

in the sum of $150,000 had been issued and delivered to the syndicate and the present bondholders represented by the complainants, they were paid by the railroad company and the Oregon-Washington Timber Company; and at the time said bonds were issued all of the stock of the railroad company was held and voted by the members of the syndicate, the present holders of the bonds sought to be foreclosed in this action, and paid for by the companies securing the same, including the Washington Northern Railroad Company and the Oregon-Washington Timber Company, and the same was paid to the members of the syndicate at their instance and with the connivance of the Mississippi Valley Trust Company, who was also the trustee under the mortgage securing the $150,000 Series "B" bonds.

The appellant Crawford is entitled to have this sum off-set against the claim of the present bondholders to the extent of $150,000. If the allegations of the answer are true, and for the purpose of considering this motion they must be deemed to be true, these bondholders, controlling, as the answer alleges, the actions of the trustee, and virtually dominating the railroad company and the timber company, appropriated to their own use the assets of the companies covered by the mortgages given to secure the bonds held by them and held by the appellant Crawford.

The Mississippi Valley Trust Company is charged with having full knowledge of all of the facts relating to the issuance and payment of these bonds, and it acknowledged satisfaction of the deed of trust of January 30th, 1911, and acknowledged payment of these bonds. In legal effect the conniving bondholders and the Mississippi Valley Trust Company have in their possession to-day the $150,000 and interest realized from the payment of these bonds. If the allegations of the answer are true, and they must have been deemed true at the time the lower court granted the motion to strike, they took this money with full knowledge that they had no legal right to it and took it with full knowledge that the money constituted a part of the property securing the issue of bonds of the railroad company and the timber company. The Mississippi Valley Trust Company, knowing that the $150,000 of bonds were issued without consideration, nevertheless consented that the money used in paying for the same, which it held in trust for the benefit of the bondholders, should be turned over to the syndicate, the present holder of the bonds represented by complainants. The trustee, as we have heretofore urged, is charged with the duty of applying the trust funds in accordance with the provisions of the deed of trust; and the trustee who participated in this wrongful di-

version of the securities which it held under its various deeds of trust, is now seeking to take the balance of the property covered by the deed of trust in order to pay it over to these recreant bondholders, who have already received $150,000 as a trust fund for the protection and security of the bondholders, and at the instance of certain bondholders it takes these trust funds and pays them over to these bondholders, and now on behalf of these same bondholders seeks to enforce the bonds held by them against the remaining property. It does not make any difference what language may be used in the pleadings,—whether it be called a set-off or an affirmative defense requiring the complainants and bondholders to account for this money, the legal effect of it is the payment to the bondholders to the extent of $150,000. These bondholders, contrary to the provisions of the deed of trust, have received trust funds which they could not have received without the consent of the trustee, and equity and good conscience lead one to the inevitable conclusion that it must be treated and considered as a payment to that extent of the bonds held by them.

This of course assumes that the allegations of the answer could have been established by the proof, and the appellant was at least entitled to have that issue determined upon the facts.

Again, equity ought not to permit them to enforce their bonds when they are seeking to do such an unconscionable thing. They are estopped from asserting in a court of equity the claim upon their bonds when they have already received out of the property covered by the trust deed the sum of $150,000 in cash. They ought to be required to do equity before asking the aid of a court of equity. If the railroad company and the timber company had given to these bondholders $150,000 out of funds not covered by the mortgages or deeds of trust, there might be some plausibility in the opposing contention; but the deeds of trust, by their very language, cover all the property of every nature and kind owned by the companies at the time of their execution, as well as after acquired property, and these bondholders, with the knowledge that the funds they were taking were trust funds, with the active assistance of the Mississippi Valley Trust Company, appropriated the money to their own use, and it would be unconscionable for a court of equity to permit the syndicate and these bondholders, now represented by the complainants, to say to the Court: "We have taken $150,000 of the property covered by the mortgages in violation of the terms of the mortgages and intend to hold this money, to which we have no legal right, and at the same time we expect this court of

equity to render us such assistance as will enable us to participate in the proceeds of the sale of such assets of the company as we did not take."

When a trustee and those in collusion with him appropriate trust funds, it is the duty of a court of equity to compel a restoration of those trust funds so misappropriated before it permits them to share in the remaining assets of the corporations which are admittedly insolvent. Whether it be called a set-off, estoppel or payment, it is a defense well within the jurisdiction of a court of equity, and one that ought to be entertained by a court of equity.

The deeds of trust provided that the assets of these two corporations should be held and used for the payment of all of the bonds pro rata, and that all of the bondholders should be treated alike. Crawford owns $400,000 of the first mortgage bonds of the railroad company and $400,000 of the second mortgage bonds of the timber company, and as such holder he is entitled to raise the question and have the court determine what, if any, portion of the proceeds of the mortgaged property had been wrongfully appropriated by certain favored bondholders, with the active co-operation and assistance of the trustee, whose duty it was to see that the mortgaged assets in case of a foreclosure should be distributed among all of the bondholders pro rata. And Craw-

ford was entitled as one of the beneficiaries under the first mortgage of the railroad company and as the holder of the second mortgage bonds of the timber company, to have the relative value of his lien determined as against the other bondholders.

But it will be contended that a party collaterally interested in a set-off or counterclaim has no right to exercise the election of when to set it up, but that a second mortgagee may allege ordinarily any invalidity or informity in the plaintiff's cause of action.

Crawford's securities, covered by the deed of trust securing the $400,000 first mortgage bonds of the railroad company and the second mortgage bonds of the timber company, have been diminished by $150,000 wrongfully extracted out of the securities and paid over to these favored bondholders, who are now seeking to take the remaining assets. As the holder of the first mortgage bonds of the railroad company and the second mortgage bonds of the timber company, he has the right to ask a court of equity to refuse to permit bondholders of equal rank with himself to establish the lien of their bonds upon the assets remaining unless and until they shall have first accounted for that part or portion of the trust funds which they have wrongfully appropriated to their own use. In this case it is al-

leged in the answer that these bondholders (with the consent of the trustees) who are now seeking to establish their lien upon the remaining assets of the companies, have already diverted into their own pockets $150,000 of the securities described in and included under the trust deeds.

The railroad company cannot have any election about the matter. It is a defense that belongs to Crawford, because his security has been diminished by $150,000 which the bondholders represented by the complainants have fraudulently appropriated.

On the trial in the lower court counsel for appellees cited the case of *Bronson vs. LaCrosse*, 2 Wallace, 283, and will probably cite the same in this Court. In that case the facts were very different from those in this case. In the Bronson case the bonds of the first mortgage had already been negotiated and were in circulation in the business community, and the court held that the second mortgagee, whose mortgage by its terms was made subject to the first mortgage, could not contest the validity of the bonds. But in this case the bonds have not been negotiated but are in the hands of the original holders, who received them without consideration, and they have not been negotiated to the extent of at least $300,000. The Court in the Bronson case said that the bonds had been negotiat-

ed and that the holders were in the enjoyment of them prior to the execution of the third mortgage.

This case is different again from the Bronson case in that Crawford is claiming under his defense protection as the holder of the first mortgage bonds of the railroad company, and as such holder he occupies a position of equal rank with the holders of the valid bonds represented by the complainants. The Bronson case does not decide that the holders of some of the first mortgage bonds would be deprived of the right to have determined the priority of their liens with other holders of the bonds of equal rank, if such bondholders had already received out of the mortgaged property at least one-half of the amount of the face of the bonds they hold. And the same is true in the case of *Jerome vs. McCarter*, 94 U. S., 734. In the case of *Gillespie vs. Terrance*, 25 N. Y., 306, the Court makes a distinction which differentiates this case from that. In that case the surety sought to set up damages resulting from a breach of warranty as to the quality of certain timber. Here the bondholders represented by the complainants received the $150,000 out of the trust property and are seeking in a court of equity to enforce their claims for the full amount against the remaining property. And in this case as to the money diverted from the railroad company to the

timber company, referred to in the first part of the motion, there was a failure of consideration.

In the case of *Force vs. Age-Herald*, 33 Southern, 866, the facts are also entirely different from the facts alleged in this answer. There the question was one of *ultra vires* only. Here Crawford is asserting his rights as an innocent holder for value of $400,000 of the first mortgage bonds of the railroad company, and he is also asserting his position as a lien creditor and claims that as to one part of the motion, there was a failure of considertion, and as to the other portion of the motion there was a payment to the bondholders,—or at least there was a seizure by the bondholders,—of at least $150,000 of the mortgaged property pledged to the pro rata payment of all of the bonds secured by the deed of trust, and if they did receive $150,000 of the proceeds of the property covered by the mortgage they certainly should be estopped from insisting upon the payment of their entire indebtedness out of the remaining funds.

It will doubtless be contended by counsel that Crawford cannot complain about the diversion of any portion of the $540,000 proceeds of the bonds from the railroad company to the timber company for the reason that he is a creditor of both companies. Such contention does not appear to us to be

sound. It is true Crawford holds the first mortgage bonds of the railroad company and the second mortgage bonds of the timber company and holds the notes or bonds of all three companies; but his relative position as a lien holder is different in each case. The money that was diverted was money that belonged to the railroad company, and Crawford's rights were those of a first lienor so far as the property of the railroad was concerned, and it will not do to say that he should be deprived of his first lien, which may be sufficient to pay his claim in full, because he happens to have a second lien upon some other property. It is manifest from the allegations of the answer that the bondholders represented by the complainants, to the extent of $300,000 never paid to the railroad company the amount of the purchase price which they agreed to pay, but they did pay it to another and entirely different company. They represented all parties; they controlled the railroad company, the trustees and the syndicate; they had the whole matter in their hands; they deposited the money with the Mississippi Valley Trust Company under an agreement that it should go to the railroad company for specific purposes and provided that it could only be checked out upon checks signed by the railroad company, countersigned by the trust company; and they cannot be heard to say

that they ever paid the purchase price of the bonds according to the agreement with the railroad company, but they paid it to some other company. There was a failure of consideration and Crawford clearly had a right to raise this question and to have it determined upon the evidence.

As to the $150,000 of bonds, Series "B": These bondholders put their hands into the treasury of the railroad company and the other companies and took out that amount of money, and took it from property that was pledged for the protection of all of the bondholders alike.

The action of the Court in striking these allegations from the answer seems to us to have been erroneous, and the appellant Crawford ought to have been permitted to establish these facts by proof, and it must be presumed at this time and for this purpose that he could have done so, and that the allegations were true.

The lower court in its opinion (Tr. p. 317) seems to have been laboring under a misapprehension as to the facts relating to the claim of Crawford to the $400,000 of first mortgage bonds of the railroad company, and seems to have been under the impression that the appellant Crawford would not be entitled to these bonds until they were from time to time surrendered or paid under the terms of

the first mortgage. It is true that the first mortgage provides that when a bond is paid or taken up it should be surrendered or marked "cancelled" at the election of the railroad company: that is, when a timber company bond was paid a corresponding bond of the railroad company should be cancelled, or returned to the railroad company uncancelled (Crawford Mortgage, p. 18).

According to the complaint and answer $30,000 of the $600,000 first mortgage bonds of the timber company were taken up and bonds for the same amount delivered uncancelled to the railroad company. This $30,000 of bonds was therefore held by the railroad company uncancelled and under the Crawford mortgage was assigned to him as collateral security, and the lower court was possibly correct in holding that any bonds so taken up and reissued would be subject to the remaining portion of the $600,000 of bonds not taken up, and the cases cited by the lower court tend to support his conclusion as to this $30,000 of bonds, and we have no serious fault to find with the Court's opinion of it be limited to that portion of the $600,000 of bonds, to-wit, the $30,000 that were taken up by the timber company and returned uncancelled to the railroad company. However, that is not the matter that was before the Court, or that was embraced in

the motion to strike. The agreement of June 4, 1910, expressly provides as follows (Tr. p. 78):

"The $1,000,000 par value of your bonds hereby proposed to be purchased by us" (Oregon-Washington Timber Company) "are all to be executed and delivered by you" (Washington Northern Railroad Company) "to the trustee in the mortgage securing the same, and to be by said trustee duly authenticated, and $600,000 par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security under the terms of a certain first mortgage dated June 4, 1910, executed by us" (Oregon-Washington Timber Company) "to said Mississippi Valley Trust Company to secure an issue of $600,000 par value 6% gold bonds issued by us, and the remaining $400,000 par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4th, 1910, executed by us to said Trust Company to secure an issue of $400,000 par value second mortgage 6% gold bonds issued by us, which latter $400,000 par value second mortgage bonds are the bonds hereinabove agreed to be sold and delivered to you."

This clearly shows that it was the intention to do two things:

First: The railroad company was to receive $540,000 in cash for the $600,000 first mortgage bonds as these bonds were sold for the $540,000.

Second: The $400,000 of second mortgage bonds of the timber company, secured by the $400,000 first mortgage bonds of the railroad company were deposited by the trustee as an entirely different

and separate transaction from the $600,000 issue.

We are unable to see the applicability of any of the authorities cited in the opinion of the lower court as to the $400,000 first mortgage bonds of the railroad company securing a like amount of bonds of the timber company to be deposited with the trustee, because they were two separate transactions, one relating to the sale by the railroad company of $600,000 of its bonds, the other relating to the $400,000 of bonds of the railroad company which were to be sold at some future date and to be used for an entirely different purpose. And we are unable to conceive by what process of reasoning the court should reach the conclusion that the $600,000 of first mortgage bonds of the railroad company numbered from 1 to 600 inclusive should be entitled to preference in payment over and above the $400,000 of first mortgage bonds of the railroad company from 601 to 1,000 inclusive. The mortgage of the railroad company of June 4, 1910, on the contrary expressly provides that the bonds shall be of equal rank, and we think the court was misled in reaching his conclusion upon the theory that the same rule applied to the bonds numbered from 601 to 1,000 inclusive as to the bonds that were returned to the railroad company from time to time as they were taken up by the timber company.

The relative rank of the $600,000 of first mortgage bonds of the railroad company numbered from 1 to 600 inclusive as compared with those numbered from 601 to 1,000 inclusive we shall further consider during the progress of our argument upon other assignments of error.

The motion to strike from the cross-complaint of Crawford (Tr. p. 168) involves substantially the same question as we have just discussed with reference to the motion to strike from the answer of Crawford and the same argument is applicable.

There is, however, one feature of the motion to strike from the cross-complaint that does not appear in the motion to strike from the answer.

The Mississippi Valley Trust Company and the Union Trust Company (Tr. p 168) moved to strike from the cross-bill the seventh paragraph, found on page 93 of the transcript. By this paragraph the appellant Crawford undertook to bring into the case and have made parties thereto Frank P. Hayes, William C. Little and others who constituted the syndicate referred to in the answer, which syndicate purchased the $600,000 first mortgage bonds and still owns the $300,000, according to the allegations of the cross-bills, which are now being foreclosed by the Mississippi Valley Trust Company. This syndicate also owned at the time of the transaction herein-

before referred to, all of the stock of the railroad company and dominated and controlled all of the actions of the Washington Northern Railroad Company, the Oregon-Washington Timber Company, the Blazier Timber Company and the Mississippi Valley Trust Company.

The appellant Crawford undertook to make the members of this syndicate parties to the suit, so that their rights and responsibilities could be determined in the one action. We think they were necessary parties,—or at least proper parties. If the Mississippi Valley Company in foreclosing the mortgages represented the bond holders then these gentlemen ought to have been in court and must have been in court before a court of equity would be justified in requiring an accounting from them.

We think the court erred in not permitting the members of the syndicate above named to have been made parties to the action.

Bonds Numbered 601 *and* 1,000 *Inclusive in the Sum of* $400,000 *of the First Mortgage Bonds of the Washington Northern Railroad of at least Equal Rank and Dignity with the* $570,000 *of Bonds Represented by the Mississippi Valley Trust Company*:

The provisions of the mortgage of the Washing-

ton Northern Railroad Company to the Mississippi Valley Trust Company, as well as the provisions of the bonds themselves, state that the bonds are all of like tenor, amount and date and that the payment of the principal and interest of all of said bonds is equally secured by the deed of trust (Complainants' Exhibit 8, page 3, Tr. p. 246).

The mortgage of the railroad company provides that the entire issue of 1,000 bonds should be of equal rank. 600 of them were sold first; the 400 remaining were to be sold at a later date. These 400 bonds were also payable at a later date.

In some jurisdictions it has been held that where a series of notes is secured by a real estate mortgage, the notes payable at different dates, the purchasers of these notes when negotiated are entitled to have their leins enforced according to the dates of negotiation. But the rule in the State of Washington is different and the Supreme Court of the State of Washington has held that all the notes secured by a mortgage are of equal rank, regardless of the dates of their negotiation or assignment.

In the case of *The First National Bank vs. Andrews,* 7 Wn., 261, it was held that:

"Where two notes executed at the same time but payable at different dates are secured by a mortgage upon real estate, the assignment of the notes to different parties does not give the assignee of the note first

maturing a priority in the proceeds of the mortgaged premises, but the assignees are entitled to share pro rata therein."

And the Supreme Court of Washington in the same case says:

"On the question of the priority of the assignees, an investigation of the authorities in this opinion would be profitless, for the rules announced by the courts are absolutely at variance and cannot be reconciled. There are, however, two general rules promulgated by the courts. The one established in a large number of states is, that where the notes are made payable at different dates and are assigned by the mortgagee, either with or without an accompanying assignment of the mortgage, the holder of the first note coming due has a prior right in the proceeds of the mortgaged premises. In other words, that the right of priority among the respective assignees was tested by the maturity of the respective notes. While a vast number of cases of equally respectable authority hold that, under the circumstances mentioned above, there is not preference given to the first note maturing, and that in the absence of expressed stipulation there is no priority in the case at all and that all the assignees are entitled to share pro rata in the proceeds of the mortgaged premises. * * * * The security was intended as much for the last note coming due as the first one. There seems to be no real reason why the relative position of the notes and mortgage should be changed because the ownership of the notes has changed. The value of the notes frequently depends upon the security. We think the more equitable and consistent rule is to leave their values undisturbed by their assignment."

The 600 bonds of the railroad company matured at ealier dates than the last 400 bonds, and the lower court in reaching the conclusion as announced in the

first opinion,—that the 600 bonds of the railroad company were entitled to be paid before the last 400 may have been due to the decisions referred to by the Supreme Court of Washington, and with which that court did not agree.

The Supreme Court of Washington expressly holds in the case last mentioned that it is the rule of local law in this state in regard to mortgages that all of the bonds, regardless of the dates of their maturity, are to be paid out of the security *pro rata* and that there is no preference in favor of the holder of the first maturing bond. And this court, in the matter of local laws affecting real estate mortgages is, of course, controlled by the decisions of the Supreme Court of the State of Washington, wherein the property covered by the mortgage in question is located.

The language of the railroad mortgage provides for a *pro rata* payment of the bonds and the Supreme Court of Washington holds that they must be paid *pro rata.*

There is nothing in the mortgages of the Washington Northern Railroad Company indicating that the bonds numbered from 601 to 1,000 inclusive occupied any inferior or subordinate position to the bonds numbered from 1 to 600 inclusive. Article 28 of the first mortgage of the Oregon-Washington Timber Company to the Mississippi Valley Trust Com-

pany (Complainants' Exhibit 9, Tr. p. 246) does contain this provision:

"ARTICLE 28: It is hereby further covenanted and agreed that as and when from time to time any of the bonds hereby secured are paid at maturity or on call, and cancelled by the trustee, a like amount par value of the bonds of the Washington Northern Railroad Company conveyed to and held by the Trustee under this mortgage deed of trust shall be cancelled by the trustee and returned to said railroad company or delivered uncancelled to said railroad company, at its option."

But this provision only relates to bonds paid to the dates of their maturity, or rather taken up at the dates of their maturity. There is no dispute as to the fact that the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company executed and delivered to Crawford the $425,000 of bonds referred to in the pleadings, and in the answer and cross bill of Crawford, and that these bonds have not been paid nor any part thereof. That by reason of the default of said obligors the entire sum became due and payable; and that the proper notice of the election of Crawford to declare the bonds due and payable was duly and regularly given. Neither is there any question involved in this case as to the proper execution of the Crawford mortgage, nor any question as to the Crawford mortgage constituting a first lien upon all of the property of the Blazier Timber Company. There is no dis-

pute or question about these issues and it was conceded at the trial that Crawford was entitled to a decree of foreclosure of his mortgage against all of the property of the Blazier Timber Company and against all of the property of the Washington Northern Railroad Company and the Oregon Timber Company; but of course the rank and priorities of the liens of complainants and cross-complainants are subject to dispute.

It is the contention of Crawford that there was assigned, transferred and conveyed to him by his deed of trust $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company which carried with them $400,000 of the first mortgage bonds of the Washington Northern Railroad Company, which were held by the Mississippi Valley Trust Company as security for the payment of the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company.

As such holder of the $400,000 of the bonds of the railroad company the appellant Crawford contends that he is entitled to participate *pro rata* at least with the holders of the $570,000 first mortgage bonds of the railroad company; that the Washington Northern Railroad Company issued $1,000,000 of first mortgage bonds; $600,000 of these first mortgage bonds were pledged to secure $600,000 of the first mortgage

bonds of the Oregon-Washington Timber Company, and $400,000 were pledged to secure the payment of the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, which Crawford holds as collateral security for his $425,000 of bonds; that $30,000 of the $600,000 first mortgage bonds of the railroad company were paid by the timber company and surrendered uncancelled to the railroad company in accordance with the terms of the mortgages of June 4, 1910. This $30,000 of bonds were also pledged to secure the bonds secured by the Crawford mortgage.

So far as the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company are concerned there can be no question but that they undertook to assign, transfer, pledge and convey to Crawford the $400,000 second mortgage bonds of the Oregon-Washington Timber Company and the $400,000 first mortgage bonds of the railroad company nor can there be any question as to the representations made by the railroad company and the Oregon-Washington Timber Company that they had the right to pledge these bonds. On page 18 of the Crawford mortgage it is said:

"That said $400,000 second mortgage bonds of the timber company were duly issued to and the rail-

road company is now the lawful owner of the same, and is authorized and empowered to use, negotiate, assign and pledge the same for its corporate purposes." (Complainants' Exhibit 11, p 18; Tr. p 247).

And again on the same page of the Crawford mortgage it is said:

"The railroad company does hereby sell, assign, pledge, transfer and set over to the trustee: (a) said $400,000 mortgage bonds of the timber company (b) the said $1,000,000 first mortgage bonds of the railroad company as they are from time to time released and delivered, or releaseable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the timber company."

And on page 24 of the Crawford mortgage the Oregon-Washington Timber Company states as follows:

"All of said first mortgage bonds of the timber company have been sold and issued and are now outstanding, and all of said second mortgage bonds of the timber company have been duly sold and issued and the railroad company is now the lawful owner thereof."

And again on the same page it is further stated:

"The timber company does hereby further sell, assign, pledge, transfer, and set over to the trustee" (Crawford) "all of its right, title and interest in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the railroad company as they are from time to time released and delivered, or releaseable and deliverable, under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the timber company."

Again, on page 45 of the Crawford mortgage, it is said:

"* * * * And that the $400,000 second mortgage bonds of the timber company hereinbefore described and pledged and deposited hereunder as further and collateral security for the notes issued hereunder are not subject to the lien of any of said mortgage deeds of trust of the timber company and the railroad company, but are subject to the first and prior lien hereof."

No clearer or more exact language could have been used to express the manifest intention of the railroad company and the Oregon-Washington Timber Company that the lien of Crawford was a valid first and paramount lien, both upon the $400,000 of first mortgage bonds of the railroad company and the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, and we think the conclusion is necessarily forced upon the court that so far as the Washington Northern Railroad Company and the Oregon-Washington Timber Company could give a first lien upon the $400,000 first mortgage bonds of the railroad company and the $400,000 second mortgage bonds of the timber company, they established such a lien; and if the court reaches the conclusion that a first lien was established in Crawford's favor upon the $400,000 first mortgage bonds of the railroad company, then it follows that these bonds, owned by Crawford as pledgee, without con-

tradiction or dispute, are entitled to participate with the $570,000 of bonds of the complainants *pro rata* in the distribution of the proceeds of the sale of the property of the railroad company.

But it was contended in the lower court, and will doubtless be contended here, that the Crawford mortgage expressly provides that Crawford's lien for the $400,000 bonds should be subject to the prior mortgages by the Washington Northern Railroad Company and the Oregon-Washington Timber Company, and counsel will refer to certain provisions on page 44 of the Crawford mortgage, where it is said:

"It is hereby expressly declared that the lien of this indenture on the properties of the timber company and the railroad company is subject to the lien of those two certain first and second mortgage deeds of trust executed by the timber company and of that certain mortgage deed of trust executed by the railroad company to the Mississippi Valley Trust Company, trustee, as hereinbefore set forth, as to all the property covered by and to the extent stated in said respective mortgage deeds of trust; and all property mortgaged or pledged to the Mississippi Valley Trust Company, trustee, under said mortgage deeds of trust, and any and all such shares of stock, bonds, notes, or other obligations or securities delivered to said trustee under or pursuant to or in connection with said mortgage deeds of trust, shall be held, subject only to the prior lien thereof, subject to the lien and charge of this indenture for the security of the notes issued hereunder, all with the same force and effect as if the said property, shares of stock, bonds, notes and other obligations and securities had been

and were specifically included and described in the granting and pledging clauses of this indenture."

The court will bear in mind in connection with the above extract that Crawford under his mortgage not only included the $400,000 of first mortgage bonds of the railroad company and the $400,000 of second mortgage bonds of the timber company, but his mortgage included by specific description all of the real and personal property of the railroad company and the Oregon-Washington Timber Company, and the clause just quoted manifestly provides that the specific real and personal property described in the mortgage should be subject to the first and second mortgages of the railroad company and the timber company. But this does not militate against the position of Crawford, because Crawford, by virtue of his ownership of the $400,000 first mortgage bonds of the railroad company, became entitled thereby to be protected according to the provisions of the first mortgage of the railroad company to the Mississippi Valley Trust Company. It is true that Crawford's mortgage recognizes that the Mississippi Valley Trust Company would have the right to enforce its claim as trustee for all of the bonds secured by the mortgage of the railroad company, in which the $400,000 of bonds owned by Crawford were entitled to participate. All that can be said of the provision quoted

and other similar provisions of the Crawford mortgage is that Crawford was not entitled to have his bonds paid out of the proceeds of the sale of the physical property of the railroad company until the entire $1,000,000 of bonds secured by the first mortgage of the Mississippi Valley Trust Company had been paid; and we see nothing in the Crawford mortgage or in the evidence in this case that would lead the court to believe that it was the intention of all the parties that Crawford, the holder of $400,000 of the first mortgage bonds of the railroad company should not be entitled to participate in the proceeds of the sale of the properties of the railroad company.

The provision found on page 18 of the Crawford mortgage,—that the railroad company's bonds from time to time as released and delivered or releaseable and deliverable should become pledged to Crawford to secure his bonded indebtedness, certainly refers to the provision contained in the first and second mortgage bonds of the timber company and the railroad company,—that when a bond of the timber company was paid a bond of the railroad company for a similar amount should be released and delivered to the railroad company; but we fail to see the application of this clause to the $400,000 of first mortgage bonds of the railroad company held by the Mississippi Valley Trust Company as security for the $400,000 second

mortgage bonds of the timber company pledged to Crawford. Crawford already had assigned to him this $400,000 of bonds. The provision that he should have the bonds when released and delivered or releaseable and deliverable is meaningless as to the bonds already affirmatively pledged to him. We think the court must construe this provision as referring only to those bonds of the railroad company released from time to time by the payment of a corresponding number of bonds of the timber company. Crawford would not get bonds of this character until they were released, and there is nothing in the mortgage that gives him a right to those bonds until released by the payment of the timber company.

But the provisions of the Crawford mortgage show that he already had assigned, transferred, conveyed and pledged to him the $400,000 first mortgage bonds of the railroad company together with the $400,000 second mortgage bonds of the timber company, and such a provision as to the bonds already owned by him would be a useless thing. But if the court gives it the interpretation for which we contend, then it has a meaning, and that meaning is that when the $600,000 first mortgage bonds held by the Mississippi Valley Trust Company were released from time to time by the payment of a corresponding number of bonds of the timber company, Craw-

ford was to get these bonds, and the fact that $30,000 of the first mortgage bonds of the railroad company were turned over to Crawford by the Mississippi Valley Trust Company upon the payment of a corresponding number of bonds by the timber company clearly shows that this was the interpretation placed upon the contract, not only by the railroad company and the Oregon-Washington Timber Company, but also the interpretation placed thereon by the Mississippi Valley Trust Company, the complainant in this action.

The Mississippi Valley Trust Company never contended, until the institution of this action, that the holders of the $600,000 first mortgage bonds of the timber company and the $600,000 first mortgage bonds of the railroad company had any lien or claim of any kind whatsoever upon the second mortgage bonds of the timber company or the $400,000 first mortgage bonds of the railroad company; and it was stipulated (see deposition of Frederick Vierling, Tr. p. 276) that the $600,000 first mortgage bonds of the railroad company were pledged to secure the $600,000 first mortgage bonds of the timber company, and that $400,000 of the bonds of the railroad company were pledged as collateral security for the $400,000 second mortgage bonds of the timber company. Nowhere in the record is there any ground for insisting that

any of the parties ever understood that the $400,000 first mortgage bonds of the railroad company were subordinate to the $600,000 of bonds represented by the complainants in this action.

Moreover, the Mississippi Valley Trust Company was the trustee named in the mortgage of January 30th, 1911, executed by the Blazier Timber Company, the Oregon-Washington Timber Company and the Washington Northern Railroad Company, and in this mortgage which was given to secure $250,000 of bonds, the railroad company and the Oregon-Washington Timber Company pledged to the Mississippi Valley Trust Company the identical $400,000 of first mortgage bonds of the Washington Northern Railroad Company and the $400,000 of second mortgage bonds of the Timber Company, in which it is stated as follows:

"That the $400,000 of first mortgage bonds of the railroad company are a part of an issue of $1,000,000 of said bonds issued by said railroad company and secured by a first mortgage on said railroad property and equipment to the Mississippi Valley Trust Company as trustee."

And in the last paragraph of said mortgage, at page 50, it is said:

"The railroad company covenants that it is the owner of said second mortgage bonds of the timber company hereby conveyed as security, and has full authority and right to make this conveyance of the same."

This action of the complainant, the Mississippi Valley Trust Company, clearly demonstrates that on the 30th of January, 1911, long after the first mortgages were issued, it recognized the right of the railroad company and the timber company to pledge these bonds to it for an advance of $250,000, and the evidence shows that out of the proceeds realized from the Crawford mortgage this mortgage of $250,000 was paid to the Mississippi Valley Trust Company to satisfy the bonds secured thereby; so that it is manifestly apparent that the Mississippi Valley Trust Company, the complainant in this action, the Oregon-Washington Timber Company and the Washington Northern Railroad Company have all construed the contracts to mean that the $400,000 of second mortgage bonds of the timber company and the $400,000 first mortgage bonds of the railroad company were subject to sale, pledge and hypothecation by the Oregon-Washington Timber Company and the Washington Northern Railroad Company, and this mortgage of January 30th, 1911, and the amendatory mortgage thereafter executed have both been satisfied and the bonds secured thereby paid.

Can it be conceived that the Mississippi Valley Trust Company would have taken the $400,000 first mortgage bonds of the railroad company and the $400,000 second mortgage bonds of the timber com-

pany as security for these bonds had it not been the understanding and intention of all the parties that the railroad company and the timber company had a right to pledge them? And can it be conceived that the Mississippi Valley Trust Company would have caused the railroad company and the timber company to covenant that they did have the right to pledge these bonds, if it was contrary to the intention of all the parties at the time the arrangement was made with reference to the deposit of such bonds with the Mississippi Valley Trust Company?

The Mississippi Valley Trust Company in this action represents the bondholders and its interpretation of the meaning of the provisions of the deed of trust, so far as this action is concerned, is binding upon the bondholders represented by it, and it ought not now to be heard to contend for a different interpretation with reference to the right to pledge the $400,000 of first mortgage bonds of the railroad company than it has previously placed upon the matter.

The contract of June 4th, 1910, between the Washington Northern Railroad Company and the Oregon-Washington Timber Company contains the following provision:

"Said $400,000 par value of our" (timber company) "bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for extensions, betterments or equipment to your railroad after

the expenditure of the said sum of $540,000 above mentioned."

It may be suggested that this provision would impose upon Crawford, or the bondholders represented by him, the duty of seeing to the application of the proceeds of the money advanced by him, and to see to it that said money went into extensions, betterments or equipment.

The railroad company and the timber company may have made such an agreement, but they would undoubtedly have the right to modify and cancel such an agreement. This they did, both in the execution of the Crawford mortgage and in the execution of the mortgage of January 30th, 1911, to the Mississippi Valley Trust Company.

Crawford advanced the money at the time the mortgage was executed, and that money has been shown to have been used in paying off the mortgage of January 30th, 1911, and this money went to the Mississippi Valley Trust Company, for the use and benefit of at least $300,000 of the $570,000 of bonds represented by the complainants in this action. It is certain, and the evidence so shows, that the mortgage was satisfied by the Mississippi Valley Trust Company.

There is nothing in the contract requiring the purchaser of the $400,000 of second mortgage bonds

of the timber company and the $400,000 of first mortgage bonds of the railroad company to see to the application of the money. That was a covenant between the railroad company and the timber company. If violated an action for damages might result. Crawford occupied no fiduciary relation with either the railroad company or the timber company, and he performed his whole duty when he paid the money over to them. The railroad company may have agreed with the timber company that it would use the proceeds of the sale of the bonds for betterments, extensions and equipment; but that is as between the railroad company and the timber company, and Crawford was under no duty nor obligation to compel the performance of any such agreement made between the railroad company and the timber company. He performed his whole duty when he paid the money over agreed to be paid by him for the bonds secured by his mortgage.

Moreover, the Mississippi Valley Trust Company, complainant in this action, participated in and consented to the diversion of the funds received by the companies from Crawford, if there was any diversion, because as the trustee under the mortgage of January 30th, 1911, it received at least $250,000 thereof, and satisfied the mortgage, and by reason of its action, as shown by the evidence in this case, it

certainly is now estopped, as the representative of the bondholders, from contending that the holders of the bonds represented by Crawford should be denied the right to participate in the proceeds of the sale of the property of the railroad company in the proportion that their $400,000 of first mortgage bonds bears to the $570,000 of bonds represented by the Mississippi Valley Trust Company.

We are unable to see anything in the record in this case that would estop Crawford from participating in the proceeds of the sale of the property of the railroad company, upon a *pro rata* basis with the $570,000 of bonds represented by complainants.

Moreover, the provision of the contract between the railroad company and the timber company of June 4th, 1910, above quoted as to the disposition of the funds realized from the sale of the second mortgage bonds of the timber company shows upon its face that it was a contract made between the railroad company and the timber company for the benefit of the timber company. There is nothing in the provision that indicates that it was intended to be for the benefit of any third party. Of course a contract can be made between two parties for the benefit of a third party, but the intention must be clear that it was for the benefit of a third person. This contract was not made between the bondholders and either the railroad

company or the timber company. The agreement relating to the sale of these bonds is found on page 134 of the transcript. That is the agreement between Little & Hays and the Oregon-Washington Timber Company, and there is no connection between the sale of the first mortgage bonds and the second mortgage bonds. The two contracts are entirely separate and distinct. Little & Hays had an option to handle the second mortgage upon a commission basis and failed to exercise that option. This Little & Hays contract also demonstrates to a certainty that the $600,000 first mortgage bonds of the railroad company were to be sold separately from the remaining $400,000 of railroad bonds.

"It is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to enable him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions."

Sayward vs. Dexter Horton & Co., 72 Fed., 758.

Montgomery vs. Spencer, 50 Pac., 623.

The agreement was made between the railroad company and the Oregon-Washington Timber Com-

pany, and the manifest intention was to protect the timber company. It had other lands in the vicinity of the railroad and had a special interest in having the proceeds of the sale of the bonds used in making extensions to the railroad so as to enable the timber company to market its product. But the prospective bondholders had no interest in this particular investment of the proceeds of the sale of the bonds. It made no difference to the bondholders, and could make no difference to them, in what assets the money was invested. Neither does it appear that it was even incidentally for the benefit of the bondholders. The bondholders simply had a lien upon the property and they were only interested in seeing that the proceeds of the sale of the bonds should be invested in property that would come under the provisions of their mortgage; so it is undisputable under the records in this case that the Oregon-Washington Timber Company and the Washington Northern Railroad Company affirmatively consented to the pledging of the bonds to Crawford and they waived the foregoing provision as to the use of the funds, and that the Mississippi Valley Trust Company also waived the same, by taking a mortgage upon the same property long after the agreement was made. These are the only parties interested in the transaction. The contract was not made for the benefit of the bondholders; they are not

named in it, and are not interested in it; and the language and terms of the contract show that it was made solely for the benefit of the parties to the contract.

This position which we taken is entirely consistent with out contention as to the diversion of the $540,000, the money to be advanced for the $600,000 first mortgage bonds of the railroad company. There the railroad company was dominated, controlled and owned by a syndicate which now holds $300,000 of the same bonds. Again, it is different in that the Mississippi Valley Trust Company was charged with the duty of seeing that the money was paid out for certain purposes on checks signed by the railroad company and countersigned by the trust company. None of these features are applicable to Crawford's position.

After Acquired Property:

The lower court in its first opinion on the motion to strike held that the $600,000 of first mortgage bonds of the railroad company were superior to the $400,000 of bonds of the railroad company held by Crawford and that the $570,000 of bonds represented by the complainants must be first paid out of the proceeds of the sale of the property of the railroad company before anything could be paid on the remaining

$400,000 of the first mortgage bonds of the railroad company held by Crawford. This we have already discussed. This opinion of the court is found at page 305 of the transcript.

Upon the final hearing of the case and in the lower court's opinion at page 171 of the transcript, the court said:

"It is not necessary to determine whether the $400,000 of the railroad bonds, as acquired by the timber company before their sale by it to the railroad company, as collateral to the timber company's bonds, also sold, were of equal rank with the $600,000 sold and delivered by the trustee."

The reason assigned by the court for this change of view as to the relative priority and rank of the $570,000 of bonds represented by Crawford is based upon the clause of the mortgage relating to after acquired property (Tr. p 172).

The clause in the mortgage of the railroad company of June 4th, 1910, describing the property is as follows:

"All that certain railroad, together with rolling stock, equipment, estate and ownership, more fully described as follows:" (Then follows a description of the real property) "together with all spurs, switches, branches and extensions thereof.

"The grant is intended to include and shall include, all of the franchises, contracts, rights-of-way, easements, privileges, traffic agreements, rolling stock, cars and engines now owned by said company or which may hereafter be acquired by it and also

all rents, income, tolls and profits accruing and to accrue from its said business.

"It is the intention of these presents and it is hereby agreed, that all future acquired property, real or personal or mixed, including all future extensions, improvements or betterments of the property hereafter acquired by said company, shall be as fully embraced within the provisions hereof, and subject to the lien hereby created for securing payment of all of said bonds, together with interest thereon, as if the said property were now owned by said company and were specifically mentioned herein.

"Also all real property, timber and timber rights, and rolling stock of the railroad company of every kind and description, now owned or hereafter acquired and wherever situate, and all lands, tenements, hereditaments, buildings, structures, warehouses, workshops, mills, plants and fixtures; all machinery, engines and boilers; all documents, deeds, timber contracts and leases, maps, surveys, inventories and papers relating to the real estate and timber rights and contracts conveyed hereby, now owned or hereafter acquired; and all rents, issues and profits, earnings and income from the property hereby conveyed; it being the intention hereby to convey, and said railroad company does hereby convey, transfer and assign, all property of the above kind, nature and description, which it now owns and all which it may hereafter own or acquire in any manner."

It is contended by complainants, and the lower court held, that the second mortgage bonds of the timber company together with the first mortgage bonds of the railroad company in the sum of $400,000 when the railroad company acquired the bonds of the timber company, were brought under the provisions of the mortgage of the railroad company from the

time they were issued, under the "after acquired" clause in the mortgage of the railroad company of June 4th, 1910, given to secure the $1,000,000 of first mortgage bonds, of which $570,000 were held by complainants.

The whole scheme of financing the various companies contradicts this contension, because it is manifest that it never was the intention of the parties that the $400,000 of second mortgage bonds of the timber company and the $400,000 of first mortgage bonds of the railroad company were to be security for the payment of the $600,000 first mortgage bonds of the railroad company or of the timber company, because every portion of the record points to the fact that it was the intention to sell these second mortgage bonds of the timber company and the bonds of the railroad company to the public.

But they could not be brought under the provisions of the mortgage for another reason. Mortgages of after acquired property incidental or pertinent to the general business of the corporation may be brought under the provisions of a mortgage by an "after acquired" clause, such as in the mortgage of the railroad company. But the courts we think have uniformly held that the property that can be brought under the after acquired clause must be property necessary, incidental and appurtenant to the main

purposes of the corporation in the use of its other property. The mortgages of railroad companies usually cover the railroad, right-of-way, stations, warehouses, rolling stock and equipment, and generally contain the "after acquired" clause; but this clause, no matter how broad its terms, has been construed to be limited to after acquired property of a kind similar to that described in the mortgage, and necessary to and useful in the carrying on of the business in the use of the property that it then owns. Mortgages given by railroad companies are usually for long periods of time and the railroad equipment will wear out and new equipment take its place Mortgages containing a provision for after acquired property include all such replaced property of course, but the property that comes in under the provisions of the mortgage by virtue of the after acquired clause must be at least similar to the property described in the mortgage.

The mortgage of the railroad company of June 4th, 1910, may be searched from end to end and nothing will be found that can be construed to even remotely refer to the $400,000 of first mortgage bonds of the railroad company or the $400,000 second mortgage bonds of the timber company.

Mallory vs. Maryland Glass Co., 131 Fed., 111.

In that case the after acquired clause was:

"* * * * and also all the property, real, personal and mixed of the said Maryland Glass Company now owned by the said company or hereafter acquired by it, together with all improvements thereon and all rights and appurtenances appertaining thereto";

And the court said:

"It seems to me that the fair intention and meaning of that clause, under the circumstances of the case, may well be taken to mean the personal property in some way appurtenant to the fixed property of the company, and not the merchandise made for sale and being sold day by day."

A very excellent discussion of the question of after acquired clauses in mortgages is found in the case of *Mississippi Valley Trust Company vs. Chicago Railroad Company,* 58 Miss., 902. The provision of the mortgage in that case was as follows:

"All of its rights-of-way, lands, property, franchises, rights and appurtenances, and also all the buildings, structures and improvements thereon, and all the singular cars, locomotives, warehouses, depots, machine shops and machinery, fixtures, utensils and effects of every kind, nature and description whatever, in use upon said railroad way or in any wise attached or appurtenant to the same, intending hereby to include all its present real and personal estate and franchises now owned or hereafter to be acquired, without any exception or reservation whatever."

Notwithstanding the foregoing provision, which the court said was as broad as the English language could make it, it was held that the mortgage did not

include an hotel, storehouse, town lots and a farm of 300 acres; that the provision was too broad and too indefinite and became a nullity. The court further said that only such property would come in under the after acquired clause as was appurtenant to the property, and that the farm, hotel, etc., could not possibly be regarded as either necessary or legitimate to the business of the railroad company.

To the same effect is the case of *State vs. Glenn*, 1 Pac., Rep. 186; *Moran vs. Pittsburg Railway Company*, 32 Fed., 878.

Tested by the rules of law announced in the foregoing decisions, it must be plain to the court that mortgage bonds are not of a character similar to any of the property described in the mortgage of the railroad company, nor appurtenant to any of the property described therein and owned by the railroad company. Neither are they essential nor necessary to the railroad company in the use of the property of the company described in the mortgage. Similar provisions as to after acquired property are contained in the mortgage of the Oregon-Washington Timber Company, but the provision in this mortgage is even more restricted than the provision in the mortgage of the railroad company.

The $400,000 of the railroad company's first mortgage bonds and the $400,000 second mortgage

bonds of the Oregon-Washington Timber Company were intended to be sold for the purpose of buying other timber and equipment and were intended to be placed upon the market for sale to the public, and yet, if the conclusion of the lower court is correct, that these bonds passed under the after acquired clause and became subject to the $600,000 of first mortgage bonds of the railroad company such an intention on the part of all the companies and of the trust company would be completely frustrated. To take such a position as the lower court did contradicts the express language of the agreements for sale and is in direct conflict with the language of the mortgage of the railroad company and with the language of the bonds themselves. The provisions of the bonds and the provisions of the mortgage of the railroad company establish beyond doubt the fact that the entire $1,000,000 of bonds of the railroad company were of equal rank and dignity and in case of the sale of the property were entitled to participate in the distribution of the proceeds of the sale *pro rata.*

It is contended that the timber company acquired certain tracts of land after the execution of its mortgage of June 4th, 1910, and it is insisted that this property should come under the provisions of the mortgage of complainants executed to them by the Oregon-Washington Timber Company. If one piece

of property can be included then all of Skamania County might as well be included. The timber lands acquired were of course of a character similar to that of the property covered by the mortgage of the timber company, but they were in no sense appurtenant thereto, nor are they useful, necessary or essential to the timber company in the handling and carrying on of its business, and the authorities we have cited preclude the inclusion of this property under the provisions of the first mortgage of the timber company, or of the second mortgage of that company. But this after acquired real estate was acquired by the timber company prior to the execution of the Crawford mortgage, and is specially described in the Crawford mortgage, and we think that the Crawford mortgage is a first mortgage upon this after acquired property.

The court, however, in its opinion, says: (Tr. p. 174).

"If it was the intention that these $400,000 of railroad bonds should pass under the Crawford mortgage, free from the lien of the first mortgage, no good reason appears why they were not withdrawn from the custody of the Mississippi Valley Trust Company and delivered to the trustee under the Crawford mortgage when the latter was executed."

It does not seem to us that this suggestion is very forceful. The Mississippi Valley Trust Company simply held the $400,000 of railroad bonds as depositary or trustee. It had no active duties to per-

form as trustee. It was a mere naked trustee and held the bonds at all times subject to their disposition by the owner of the bonds, the Washington Northern Railroad Company. We fail to see any good reason for the withdrawing of the bonds by Crawford from the Mississippi Valley Trust Company. They were assigned, transferred and pledged just as effectively as though their actual physical delivery had been made. It must be conceded from the agreement under which the bonds were deposited with the Mississippi Valley Trust Company that they were subject to the control and disposition of the railroad company, and the railroad company in its mortgage to Crawford undertook to transfer all of its right, title and interest in and to the said bonds to Crawford as security for the bonds secured by his mortgage.

The lower court in its opinion (Tr. p 175) uses the following language:

"Not only is the intention shown in this first mortgage to cover such after acquired property, but an intention is also shown in the Crawford mortgage to recognize the facts that the prior mortgage does cover and include such property and that the latter —the Crawford mortgage—shall be subject to the other in such particular.

"The following appears in that mortgage, but it is not the only recital warranting a like construction:

'* * * * the railroad company does hereby further sell, assign, pledge, transfer and set over to the trustee; (a) said $400,000 second mortgage

bonds of the timber company; (b) the *said* $1,000,000 *first mortgage bonds of the railroad company as they are from time to time released and delivered, or releaseable and deliverable,* by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the timber company. * * * *

'* * * * it is hereby expressly declared that the lien of this indenture *on the properties* of the timber company and the railroad company is subject to the lien of those two certain first and second mortgage deeds of trust executed by the timber company and of that certain mortgage deed of trust executed by the railroad company to the Mississippi Valley Trust Company, trustee, as hereinbefore set forth, *as to all the property covered by and to the extent* stated in said respective deeds of trust; and all property mortgaged or pledged to the Mississippi Valley Trust Company, trustee, under said mortgage deeds of trust *and any and all such shares of stock, bonds, notes, or other obligations or securities delivered* to said trustee under or pursuant to or in connection with said mortgage deeds of trust, shall be held subject only to the prior lien thereof, subject to the lien and charge of this indenture for the security of the notes issued hereunder—all with the same force and effect as if the said property, shares of stock, bonds, notes and other obligations and securities had been and were specifically included and described in the granting and pledging clauses of this indenture' (the italics are the court's).

"There are no equities in the present case which would qualify in any way, this conclusion; nor any reason why this interpretation, placed upon the mortgage and recognized by the subsequent mortgagee, should not not obtain."

In the extract from the court's opinion is contained a quotation from the Crawford mortgage with

reference to the $400,000 of second mortgage bonds of the timber company and the $1,000,000 of first mortgage bonds of the railroad company, "as they are from time to time released and delivered or releaseable and deliverable by the Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the timber company;" and the court says that because the Crawford mortgage recognizes the priority of the first mortgage Crawford must be held to have consented and admitted that his security, to the extent of $400,000 first mortgage bonds of the railroad company, and the $400,000 second mortgage of the timber company is subject to the prior lien of $570,000 of bonds represented by the complainants.

Such an interpretation by the court is unreasonable and indefensible. To give the language this effect is to nullify the provisions of the mortgage of the railroad company which expressly provides that the $1,000,000 of bonds shall be of equal rank and dignity; and yet the court says that $400,000 of the first mortgage bonds of equal rank with the first $600,000, becomes a part of the security for the $600,000 bonds, in direct conflict with the express terms and provisions of the deed of trust under which they were issued.

This interpretation is also at variance with the

plan of financing as contained in the agreement of June 4th, 1910, between the Washington Northern Railroad Company and the Oregon-Washington Timber Company.

The court will observe that this $400,000 of bonds were to be deposited with the Mississippi Valley Trust Company at the very same time the $600,000 of bonds were deposited, and in the agreement executed by the Washington Northern Railroad Company and the Oregon-Washington Timber Company, on June 4th, 1910, it is stated: (Tr. p. 132).

"* * * * said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad, after the expenditure of the said sum of $540,000 above mentioned."

If the $400,000 of second mortgage bonds of the timber company together with the $400,000 first mortgage bonds of the railroad company ever became subordinate to the $600,000 first mortgage bonds of the railroad company they became inferior and subordinate on the day of the execution of the agreement of June 4th, 1910, and yet that same agreement contemplates the sale of these bonds to the public to raise money for betterments for the railroad. Could it be that these parties expected or intended to convert into second mortgage bonds the $400,000 of first

mortgage bonds of the railroad company, issued on the same day as the $600,000 first mortgage bonds? There is nothing in the entire record that indicates any intention on the part of any of the companies to subordinate the $400,000 of first mortgage bonds of the railroad company to the $600,000 first mortgage bonds of that company. It was the manifest purpose to sell these bonds in the open market. Had they been sold in the open market and a purchaser had acquired them for value, then they would still have been a secondary security, if the opinion of the lower court is sound.

Had it been the intention of the parties to make the $400,000 first mortgage railroad bonds a secondary security and subordinate to the $600,000 first mortgage railroad bonds, why did not the railroad company issue two series of bonds instead of one? Why did they insert the provision that they did insert in the bonds themselves and in the mortgage, to the effect that these bonds were all of equal rank?

We cannot conceive of the bonds or notes of a company being brought under the after acquired clause in any mortgage. The bonds are the liabilities of the company and not its assets. Yet the reasoning of the court is to the effect that a company's own evidence of indebtedness is property and under the broad language of a trust deed becomes subject to

the mortgage and subject to the bonds that have been theretofore issued. That this cannot be so in this case is established to a demonstration by the fact that the mortgage itself of the railroad company provides that the $400,000 of bonds shall not be subordinate but shall be of equal rank and dignity with the $600,000.

Crawford paid $425,000 over to the railroad company in reliance upon these bonds. He certainly is a holder of the bonds for value. He is in the same position any individual would have been who bought the bonds from the railroad company and took an order for them upon the Mississippi Valley Trust Company, with whom they were deposited. to hold them as a naked trustee subject to the order of the railroad company which had the right to sell them at any time it saw fit.

From whatever point the question is viewed an intent is shown to make the security given for the Crawford mortgage,—the $400,000 of the $1,000,000 issue of first mortgage bonds of the railroad company, of equal rank with the $600,000 of bonds represented by the trustee in this action, and the language of the Crawford mortgage recognizing the priority of the first mortgages of the railroad company and the timber company can only be construed to be a recognition of the priority of the lien of these mort-

gages over the physical properties of the companies, and cannot, without doing violence to its language, be construed to be a recognition of the right of the Mississippi Valley Trust Company to have the $400,000 first mortgage bonds of the railroad company subject to the prior lien of the first $600,000 of the same issue of bonds.

The final decree contains this language: (Tr. p. 232).

"That the interest of the railroad company in the said 400 railroad bonds, immediately upon its acquiring of the same, became subject to the lien of the 600 railroad bonds then outstanding, and the said 400 railroad bonds could be, and were in fact, reissued by the railroad company only as inferior in dignity and subsequent in time of payment to the 600 bonds first negotiated and then outsanding."

The court will bear in mind that the railroad company issued the 400 railroad bonds at the same time it issued the 600 bonds and that the bonds were deposited with the Mississippi Valley Trust Company on the same day in pursuance of the agreement of June 4th, 1910, which expressly provides that the 400 railroad bonds should be sold and the proceeds used for betterments of the railroad company only. All of these transactions occurred simultaneously, and if this court will read the sale agreement of June 4th, 1910, and the syndicate agreement of June 4th, 1910, it will be forced to the conclusion that it was never the

intention of the parties to subject the 400 bonds to the 600 bonds.

Attorney's Fees and Costs:

The entire record shows that the Washington Northern Railroad Company and the Oregon-Washington Timber Company are hopelessly insolvent and will be able to pay a very small percentage of the outstanding bonds and we think that an attorney's fee of $33,250 for the foreclosure of each of these mortgages is excessive and unreasonable, and we do not see why the costs of the entire action should be taxed against Crawford. The action was brought to foreclose the mortgages of the Oregon-Washington timber company and the Washington Northern Railroad Company. They were the real defendants and the costs should have been taxed against the principal defendants instead of being taxed against Crawford.

Multifariousness in the Bill of Complaint:

The Court erred in permitting the complainants to foreclose the mortgage of the Railroad Company and the mortgage of the Oregon-Washington Timber Company in the same action and cause (Tr. p. 240).

The objection to the multifarious character of the bill of complaint is set forth in the answer of Crawford as follows: (Tr. pp. 64-65.)

"1. That said amended bill of complaint shows upon its face that two separate causes of action have been improperly united in said amended bill of complaint, and that said amended bill of complaint is multifarious, said amended bill of complaint embracing: (a) an action by the Mississippi Valley Trust Company to foreclose a mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company, Trustee, to secure an issue of bonds in the aggregate amount of $1,000,000; an action by the Mississippi Valley Trust Company and the Union Trust Company, Trustees, to foreclose a mortgage executed by the Oregon-Washington Timber Company, a corporation, to the Mississippi Valley Trust Company and the Union Trust Company to secure an issue of bonds of the Oregon-Washington Timber Company in the aggregate amount of $600,000, and that by so doing there is a misjoinder of the causes of action in said amended bill of complaint

"2. That there is a misjoinder of parties plaintiff in that the Mississippi Valley Trust Company, Trustee, under the mortgage of the Washington Northern Railroad Company, is joined in a complaint with the Mississippi Valley Trust Company and the Union Trust Company, Trustees, under the mortgage executed by the Oregon-Washington Timber Company.

"3. That there is a misjoinder of parties defendant in that the Washington Northern Railroad Company, which executed the mortgage upon the property of the railroad company to secure an issue of bonds by the railroad company, is joined as a defendant with the Oregon-Washington Timber Company, which executed a mortgage to the Mississippi Valley Trust Company and the Union Trust Company to secure an issue of bonds by the Oregon-Washington Timber Company.

"4. That the amended bill of complaint shows

upon its face that the Mississippi Valley Trust Company holds $570,000 of the bonds of the Washington Northern Railroad Company as collateral security for the payment of the bonds issued by the Oregon-Washington Timber Company, and the amended bill of complaint discloses an attempt to foreclose two separate mortgages executed by two different parties, involving two distinct subject matters, in one action, and that the causes of action so attempted to be joined are not joint; and the liability asserted against the Oregon-Washington Timber Company is distinct, separate and different from the liability asserted against the defendant, the Washington Northern Railroad Company, and sufficient grounds are not shown for uniting the said causes of action in order to promote the convenient administration of justice."

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But where there is more than one plaintiff the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appears that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

Rule 26, *Rules of Practice,* 198 Fed., XXV.

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder, or insufficiency of fact sufficient to constitute a valid cause of action, in equity, which might have heretofore been made by demurrer or plea, shall be made by motion to dismiss, or in the answer, and every such point of law going to the whole or material part of the

cause or causes of action stated in the bill may be called up and disposed of before the final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* entered."

Rule 29, *Rules of Practice*, 198 Fed. XXVI.

Judge Story defines multifariousness to be:

"The improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected against one defendant; or the demand of several matters of a distinct and independent nature against several defendants in the same bill."

Storey's Equity Pleading, 271.

Stafford Nat'l Bank v. Sprague, 8 Fed. Rep. 377.

"A suit cannot be maintained in equity on the ground of preventing a multiplicity of suits where the demands against each of the defendants, though of the same nature, are entirely distinct and unconnected with those against the other defendants. In such case each defendant can object to the joining of any distinct and unconnected causes of action."

Street's Fed. Eq. Prac., Sec. 426.

Hale vs. Allison, 188 U. S. 56.

"A bill will be considered multifarious if the distinct and separate claims made in it are so different in character that the Court ought not to permit them to be litigated in one suit. Two or more distinct objects cannot be embraced in the bill; its double character destroys it. Where two essentially different causes of action are joined that present no common question for litigation and require different proof, the bill is properly treated as multifarious, and a demurrer thereto should be sustained. A bill is multifarious where the plaintiff asserts two mutually antagonistic claims to relief."

Street's Fed. Eq. Prac., Sec. 432.

In this cause we have the anomaly of the complainants attempting to foreclose in one complaint two separate mortgages upon different properties, one mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and the other executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company and the Union Trust Company. The Washington Northern Railroad Company and the Oregon-Washington Timber Company are two separate and distinct corporations. The Union Trust Company and the Mississippi Valley Trust Company are the mortgagees in one of the mortgages and only the Mississippi Valley Trust Company is the mortgagee in the other. We have, therefore, two distinct plaintiffs against two separate and distinct defend-

ants. There is no justification for the procedure attempted in this action. If this procedure can be successfully followed without violating the equity rules for multifariousness then the holder of twenty mortgages executed to him by separate individuals could foreclose all of the mortgages in one action.

But the situation here is even worse. Here we have different defendants and different plaintiffs foreclosing in one action two separate mortgages upon different properties in no way connected with each other.

The appellant Crawford moved to dismiss the bill (Tr. pp. 159-161) upon the grounds above stated, which motion was denied by the Court, and then Crawford set the same up in the answer and the matter is now before this Court to determine whether the foreclosure of two separate mortgages by two separate individuals to two separate and distinct plaintiffs can be joined in one action.

We think the action of the lower Court in permitting the foreclosure of these two mortgages was clearly erroneous and the bill should have been dismissed upon the ground of multifariousness as above stated.

For the foregoing reasons we contend that the bill should be dismissed, or that the decree should be

modified in accordance with the contentions we have set forth in our brief.

Respectfully submitted,

J. A. KERR,

E. S. McCORD,

Solicitors for Appellant.